

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Glock, Inc.
Under Solicitation No. DTSA-20-03-R-00932

Docket No.: 03-TSA-003

Appearances:

For the Protester: Glock, Inc.: Kenneth B. Weckstein, Esq., Epstein
Becker & Green, P.C.

For the Transportation Security Administration: Linda L. Lewis, Esq.
and Scott M. Dalton, Esq.

For the Intervenor: Heckler and Koch, Inc.: Jennifer Kerkhoff, Esq.,
Troutman Sanders

I. Introduction

On October 20, 2003, Glock, Inc. (“Glock”) filed this Protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) challenging an award by the Transportation Security Administration (“TSA”) of a contract pursuant to Solicitation

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DTSA-20-03-R-00932 (“the Solicitation”). The Solicitation contemplated a multi-year award of a contract for the purchase of hand guns for the Federal Flight Deck Officer (“FFDO”) Program. The successful offeror, Heckler and Koch, Inc. (“H&K”), intervened in the Protest. For the reasons discussed herein, the ODRA concludes that Glock failed to sustain its burden of establishing that the TSA’s award decision lacked a

rational basis, was arbitrary and capricious, or reflected an abuse of discretion. The ODRA further concludes that Glock failed to demonstrate that the conduct of the TSA in the evaluation process was prejudicial to Glock. The ODRA therefore recommends that the TSA Administrator deny the Glock Protest in its entirety.

II. Findings of Fact

1. The Solicitation was posted by the TSA in *Federal Business Opportunities* (“Fed Bus Ops”) on May 22, 2003. *See* Agency Response (“AR”) at 4. The Solicitation contemplated an indefinite delivery and indefinite quantity (“IDIQ”) of .40 caliber semi-automatic commercially available hand guns. The initial response date stated in the Solicitation was June 6, 2003. The date was extended by a series of seven amendments, through June 24, 2003. AR Volume I, Tabs 15, 16, 19, 20, 21, 22, and 23.
2. The Procurement Plan for the Solicitation (“the Plan”), dated June 11, 2003, defines the acquisition as a non-complex, commercial purchase. AR Volume I, Tab 8.
3. Solicitation Section M.1 entitled “Evaluation-Commercial Items” provided: “The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous.” AR Volume I, Tab 11, p. 172. The same section of the Solicitation specifically calls for award to be made on the basis of best value, based on following factors: technical merit; experience and past performance; and price. *Id.* Technical merit was to be considered more important than experience and past performance, but as proposals became more equal in their non-price factors, the price factor was to become equal to the combined non-price factors. *Id.*
4. The Solicitation originally called for the non-price evaluation factors to be scored on an adjectival basis, *i.e.*, “outstanding”; “acceptable”; “marginal”; and “unacceptable.” This evaluation scheme later was changed by Solicitation Amendment Number 7 to categories of “acceptable” or “unacceptable”. AR Volume I, Tab 23.

5. The Evaluation Plan for the acquisition, dated June 23, 2003, established the overall strategy for evaluating proposals and, like the Solicitation, called for the award to be made on a “best value” basis. AR Volume I, Tab 9. The Evaluation Plan, among other things, defined proposals as “acceptable” and “unacceptable” in the following manner:

Acceptable: the offerors’ proposed pistol meets or exceeds the Government’s minimum specifications and may include one or more features above the Government’s minimum specifications that may add value to the pistol.

Unacceptable: the offeror’s proposed pistol meets some, but not all of the Government’s minimum specifications, or does not meet the Government’s minimum specifications, and features may or may not add value to the pistol.

AR Volume I, Tab 9.

6. The Evaluation Plan further required the evaluators to identify strengths and weaknesses for the non-cost/price factors of the respective offers. Attachment 6 to the Evaluation Plan defined strengths and weaknesses as follows:

KEY STRENGTH: Key strengths are unique concepts, benefits, or features which offer especially good value to TSA, lessen programmatic risks to a significant degree, or otherwise meet the requirements by offering a superior approach.

STRENGTH: A strength is something offered that exceeds the minimum requirements of the Solicitation and otherwise offers some advantage to TSA or lessens programmatic risks.

WEAKNESS: A weakness is a flaw that increases the programmatic risk of unsuccessful contractor performance without the investment of substantial resources by TSA, or the offer presents a lack of sufficient information required to allow the evaluator to determine whether or not the

minimum requirements of the Solicitation are met. The

weakness is not “fatal” to the proposal if it does not present an unacceptable level of programmatic risks.

KEY WEAKNESS: A key weakness is a feature or flaw in the proposal that is totally unacceptable and presents superficial, incomplete, vague, incomprehensible, and/or incorrect interpretations of TSA requirements that presents an unacceptable level of programmatic risks.

AR Volume I, Tab 9.

7. The Solicitation listed 13 “Technical Merit Factors” that would be scored by the evaluators as follows:

(a) Technical Merit Factor: The Government will evaluate the degree to which the offeror’s product, associated services, and analyses, test results and other data justify, substantiate and document that the offered product and service will satisfy the Government’s requirements:

1. The manufacturer’s certification and Government agency certifications of the pistol will be evaluated for compliance with FFDO Pistol Specifications, Attachment 1.
2. Pistol Reliability and Durability: The absence of parts breakage, compromise of structural integrity, or other factors which may affect operator safety.
3. Pistol Ergonomics and Adaptability: The pistol design and its ability to accommodate operators with large or small hands, or right- or left-handed.
4. Pistol Simplicity of Disassembly, Cleaning, and Reassembly: The ease by which the operator may field strip, clean, and reassemble the pistols without special tools.
5. Pistol Finishes and Appearance: The ability of the outer coating or treatment of exposed surfaces to prevent rust, corrosion,

or deterioration of these surfaces and whether or not the pistol has blemishes and sharp edges.

6. Whether or not there is reduction in felt recoil, and adaptability to optional accessories that increase the overall usefulness of the pistol.

7. Whether or not factory recommended maintenance/parts replacement procedures that include, but are not limited to, durability and rate and incident of repair, demonstrate that the pistol is a durable and reliable product that lessens risk to the Government and to the user.

8. Whether or not there is a comprehensive service life associated with the pistol that adds overall value to the pistol and lessens risk for the Government.

9. Whether or not there are comprehensive warranties that add overall value to the pistol and lessen risk for the Government.

10. Whether or not there is a mechanically, electrical, or electro-mechanical locking mechanism incorporated into the design of the firearm that prevents discharge of the weapon by anyone not having access to the key or other device designed to unlock and allow discharge of the firearm. A locking mechanism that successfully meets this safety feature will be evaluated higher than a device that when installed on a firearm and secured by means of a key or mechanically, electronically, or electro-mechanically operated combination lock prevents the firearm from being discharged without first deactivating or removing the device by means of a key or mechanically, electronically, or electro-mechanically operated combination lock.

11. ISO certified manufacturers will be evaluated higher than the non-ISO certified manufacturers.

12. The degree to which training to be provided to TSA is thorough, feasible and results in quality training and the degree to which of the cut-away model pistols and exploded diagram, and user manuals are understandable and contribute to overall quality of training and

knowledge of the pistol.

13. Enhancements will be evaluated on value, risk, feasibility and impact to the Government. If the enhancement adds value based on the technical subfactors, pistol specification and requirements and relative cost, and is considered to be a

significant strength, then the Offeror may receive credit for the proposed enhancement to the extent that enhancement is clearly described and explained in the offer. However, offerors are cautioned that inconsistent statements about enhancements in the offer may result in a neutral or negative evaluation by the Government.

AR Volume I, Tab 11.

8. The experience and past performance factor was also to be scored on an “acceptable” or “unacceptable” basis. AR Volume I, Tab 11.

9. The price factor was to be evaluated based on the total evaluated price (“TEP”) for the base year and each option year. The TEP, in turn, was to be evaluated for reasonableness, realism, and risks.

10. The TSA reserved for itself the right to award a contract without discussions, and all offerors were thus advised to include their best price and technical information. Finally, as part of the Solicitation, the TSA reserved its right to make award to other than the lowest offeror and to waive minor irregularities in the offers. AR Volume I, Tab 11.

11. As noted above, the final closing date of the Solicitation, as amended, was June 24, 2003. By that date, a total of six offerors including Glock and H&K, had proposed a total of 12 handgun models. The offerors and the respective proposed models included:

Offeror

Proposed Pistol Model(s)

Beretta USA Corporation

Cougar and 96D

Glock, Inc.

Glock 22 and Glock 23

Heckler & Koch, Inc.
SigArms
Smith and Wesson
Springfield Armory, USA

H&K USP 40 Compact, LEM
Sig 2340 SigPro and Sig P229
990 (213), 990 (204) and 99QA
XD 9109 and XD 9402

AR at 4, 5

The Evaluation and Reevaluation of Proposals

12. The Source Selection Decision Memorandum, dated July 11, 2003, set forth the results of the initial evaluation of all proposals by the Source Evaluation Team (“SET”). The Memorandum reported that, out of the twelve offers received, the Glock 22 pistol was one of the nine pistols [Deleted] requirements of the Solicitation. With respect to the Glock 23 pistol, the Source Selection Decision Memorandum found:

The Glock 23 pistol’s technical merit and experience and past performance evaluation documented [Deleted] the Glock 23 pistol includes [Deleted]. There were [Deleted] the Glock 23 pistol ranked [Deleted] in an INS evaluation of commercially available pistols performed independently of this solicitation and for Glock’s recall process. The Glock 23 had one [Deleted] its [Deleted] and [Deleted] the trigger must be manipulated to disassemble, clean, and reassemble the pistol, a special tool is needed to disassemble, clean and reassemble the [Deleted]. Glock has the lowest total evaluated price (TEP) of the three offerors. Its TEP is [Deleted].

AR Volume IV, Tab 35, p. 01044 - 01045.

13. The July 11, 2003 Source Selection Decision Memorandum analyzed the offer for the H&K USP 40 pistol as follows:

The Heckler & Koch (H&K) USP 40 pistol’s technical merit and experience and past performance evaluation documented [Deleted]

[Deleted] the H&K USP 40 pistol has an [Deleted] it ranked [Deleted]

in the INS evaluation of commercially available pistols, it has a [Deleted] on the [Deleted] Heckler & Koch provided [Deleted] of the H&K USP 40 was rated [Deleted]. No [Deleted] or [Deleted] were documented for the H&K USP 40. Heckler & Koch has the second lowest total evaluated price (TEP) of the three offerors at [Deleted] which is [Deleted] than Glock's TEP.

AR Volume IV, Tab 35, p. 01045.

14. In a trade off analysis, the July 11, 2003 Source Selection Decision determined that that H7K USP 40 pistol was preferable to the Glock 23 pistol, explaining that:

For the technical merit factor, the H7K USP 40 pistol ranked [Deleted] in the INS evaluation of commercially available pistols while the Glock 23 pistol ranked [Deleted]; the H&K USP pistol had a [Deleted] with its [Deleted] a feature that is not included on the Glock 23 pistol; and the H&K USP pistol had [Deleted] while the Glock 23 pistol had [Deleted]. In past performance, both Heckler and Koch and Glock received a [Deleted] for customer service but Heckler and Koch received [Deleted]. Glock received a [Deleted] and a [Deleted]. For price factor, the Glock TEP is [Deleted] lower than the Heckler & Koch TEP.

AR Volume IV, Tab 35, p. 01045.

15. The July 11, 2003 Source Selection Memorandum concluded that the H&K USP 40 pistol was a better value than the Glock 23 pistol because the H&K (1) received the [Deleted] from the INS evaluation; (2) it had a [Deleted] over the Glock 23 due to the [Deleted]; and (3) it received [Deleted] for the [Deleted]. The memorandum found that the additional benefits of these "non-price factors" of the H&K UPS 40 pistol outweighed the [Deleted] price differential between it and the Glock 23. Id.

16. The TSA awarded Contract No. DTSA20-03-C-00932 to H&K on July 16, 2003. AR Volume IV, Tab 36.

17. Glock was debriefed on July 25, 2003, and as a result of information generated from the debriefing, the TSA decided to reevaluate all the proposals received. AR Volume IV, Tab 44.

18. In the interim, TSA proceeded under the awarded contract. As of August 22, 2003, the TSA had placed a total of seven orders for 700 H&K USP 40 pistols in the amount of [Deleted]. AR Volume IV, Tab 39.

19. During the period from August 28, 2003, through September 22, 2003, TSA conducted discussions with Glock and H&K by submitting to them various written questions pertaining to their proposals. AR Volume IV, Tab 49 - 54. Glock and H&K responded in writing to those questions. *See* AR at 21.

20. These discussions resulted in several changes to the evaluation results, including the finding that the Glock 22 pistol, in fact, met the solicitation requirements. Additionally, the evaluation of the Glock 22 pistol resulted in the addition of a [Deleted] for the extended slide release; and the addition of [Deleted] for adaptability to optional accessories, [Deleted] ISO compliance and chambered round indicator (feel only). The [Deleted] pertaining to INS results was changed to a [Deleted], and the [Deleted] pertaining to the special tool requirement was deleted. AR Volume IV, Tab 55, p. 01337.

21. As a result of the reevaluation, for the Glock 23, a [Deleted] was added for the extended slide release; and four [Deleted] were added for adaptability to optional accessories, [Deleted], ISO compliance and chambered round indicator (feel only). As with the Glock 22, the [Deleted] pertaining to the special tool requirement was deleted for the Glock 23. AR Volume IV, Tab 55, p. 01337.

22. As a result of the reevaluation, as to the H&K UPS 40, two [Deleted] were added for the extended slide release and ambidextrous magazine release; and three [Deleted] were added for adaptability to optional features, extended warranty and ISO compliance. AR Volume IV, Tab 55, p. 01337.

23. On September 26, 2003, the SET briefed the SSO with respect to the results of the reevaluation. AR Volume IV, Tab 55. In pertinent part, the Glock 22, Glock 23 and H&K USP 40 pistols were all rated as acceptable in terms of technical merit, experience, and past performance. The specific technical ratings for these pistols were summarized as follows:

[Deleted]

24. The SET's cost-technical trade-off analysis recommended to the SSO that he make the award to H&K, notwithstanding the fact that the H&K USP 40 cost [Deleted] than either the Glock 22 or 23. This recommendation was based upon the fact that H&K (1) received a [Deleted] rating during the independent evaluation; and (2) received [Deleted] for an ambidextrous magazine release and a visual chambered round indicator. AR Volume IV, Tab 55, p. 01242-01246.

25. Based on the SET's recommendation, the SSO determined that, even though the Glock pistols were [Deleted] than the H&K pistol, the H&K product was a better value given its technical advantages. AR Volume IV, Tab 55, p. 01343.

26. On September 29, 2003, the TSA advised Glock of its reevaluation decision and exercised option one of the Contract to extend the performance period through September 30, 2004. AR Volume IV, Tabs 38 and 57.

Contentions

Original Protest

27. Glock filed its protest against the contract award to H&K on October 20, 2003. Glock's protest challenged the TSA's evaluation of its offers for the G-22 and G-23 pistols, alleging that they were at least on an equal plane with the H&K pistol, if not superior, given "serious safety concerns associated with the H&K pistol's required trigger manipulation," and that the Glock pistols represented the best value given their

lower price. Protest at 8.

28. Specifically, Glock alleged that the TSA incorrectly based its evaluation of the G-22 on the fact that it had passed the durability and reliability aspect of the INS testing, when in fact it did not meet the size requirements of the INS solicitation and thus was never tested. Protest at 4-5. Glock further complained that the G-22 was rated by the TSA as having [Deleted] because of the results of the INS evaluation, despite the fact that it was never tested. Moreover, Glock objected to [Deleted] rating given to the H&K pistol for placing [Deleted] in the INS testing, particularly since in the next most recent federal agency test – an FBI test – [Deleted]. Protest at 5.

29. Glock also challenged the evaluation's conclusion concerning the loaded chamber indicator in which the H&K pistol was [Deleted] the Glock pistol, because [Deleted]. Protest at 7.

30. Glock also took issue with [Deleted] given to the Glock pistol because the trigger was required to be pulled in order to disassemble the pistol. According to Glock, this conclusion ignored the manual's instruction to disassemble the pistol only in a safe area after ensuring that the pistol is unloaded. Glock further notes that TSA did not down-rate the H&K pistol for its need to remove the magazine and pull the trigger to activate or deactivate the H&K integrated lock, a function that allegedly would be required far more frequently in the cockpit. Glock asserts that the activation of the integral lock on the H&K pistol presented a serious safety risk and constituted a key weakness of the H&K pistol. Protest at 7-8.

31. As a remedy, Glock requested that the pistols submitted for evaluation be reevaluated by a new panel led by a new contracting officer, and that, if technical information on the pistols is required for the evaluation, that a "valid Government test", such as FBI or DEA test data, be used, as "the technical evaluations associated with these tests have stood the test of time." Protest at 9.

32. In its Agency Response, the TSA asserts that Glock's protest can be reduced to three issues, all of which essentially reflect the substitution of Glock's judgment for that of the evaluation officials. These disagreements involve (1) the TSA's decision to use the INS test scores to rate one of the thirteen technical merit sub factors in the TSA solicitation and the SET's ratings on durability and reliability; (2) the SET's ratings for the Glock pistol's trigger disassembly and the loaded chamber indicator (LCI), and the rating given to H&K for its pistol's locking mechanism; and (3) the SSO's best value selection. AR at 34-35.

33. With respect to the use of the INS test scores, TSA argues that the Solicitation informed bidders that independent sources might be used to determine if the pistols met the requirements of the pistol specifications. AR at 35. TSA further argues that it used the INS test only for subfactor (b) on pistol reliability and durability, and that subfactor (b) required the evaluation of the absence of parts breakage, compromise of structural integrity, or other factors that may affect operator safety. Contrary to the claims of Glock, TSA states that the technical merit adjectival ratings were not strongly influenced or skewed by the INS test, because the INS test was used to rate only one of the thirteen technical merit subfactors. Moreover, the TSA argues that the INS test was relevant to the FFDO Program and was the most recent test available. AR at 35.

34. The TSA also contends that the evaluation of the Glock 22 and Glock 23 for reliability and durability was reasonable and any error made between the two actually was to the benefit of the Protester, would not have changed ranking of its pistols, and therefore did not materially impact the award decision. The TSA further argues that the error had no impact whatsoever, since the SSO gave no consideration to any weaknesses found by the SET in making the award decision. AR at 39-40.

35. As for the Protest allegations concerning the loaded chamber indicator, the TSA asserts that the fact that the H&K pistol's use of [Deleted] lessened safety and programmatic risks to a significant degree, and that giving this feature [Deleted] did not lack a rational basis. AR at 41-42.

36. The TSA further argues that the finding of [Deleted] for trigger manipulation during disassembly of the Glock pistol did not lack a rational basis. According to TSA, there would be [Deleted]. GL-01513. Thus, TSA urges, the use of the H&K's integral lock cannot validly be compared to Glock's [Deleted] rating for trigger manipulation during disassembly since the integral lock will not occur more frequently than pistol disassembly. AR at 43-44.

Glock Comments

37. In its comments, Glock takes the position that the fact that the SSO allegedly based his selection decision solely on the relative number of key strengths in selecting the higher-priced H&K pistol demonstrates that the award decision was arbitrary, since he ignored the strengths of the Glock pistols and failed to make a price/technical tradeoff. Comments at 1-2. Glock also argues that the TSA treated offerors disparately and assigned strengths and weaknesses arbitrarily. Glock Comments at 10. Specifically, Glock argues:

- TSA arbitrarily failed to assign Glock a strength that it assigned another offeror for having a grip that accommodates a wide array of shooter hand sizes.
- H&K received a [Deleted] for offering a [Deleted] while Glock received the same rating despite offering [Deleted]. TSA has acknowledged that Glock's [Deleted] If a [Deleted] is deserving [Deleted] then a rational evaluation would have rated [Deleted] as [Deleted].
- The Glock-22 pistol was assigned a [Deleted] for purportedly failing another agency's test -- even though the agency (INS) did not test the Glock-22 because it was not the size weapon that agency wanted. H&K was awarded a [Deleted] for finishing [Deleted] in that same test. It was arbitrary to assign the Glock-22 [Deleted] when it was not tested. H&K's [Deleted] finish is not a strength vis-à-vis the Glock-22 since they did not go head-to-head.

- Finally, Glock was assigned a [Deleted] because its trigger must be manipulated before the pistol can be disassembled -- something that is not likely to happen in a cockpit -- while H&K received no weakness for the fact that its trigger must be pulled to lock the weapon -- something that is almost certain to happen in a cockpit.

Glock Comments at 2.

H&K Comments

38. The Intervenor, H&K, commented that Glock's protest advocates its own opinion over TSA's judgment, ignores facts in the record and speculates on the benefits and risks of its pistols versus H&K's pistol; and thus fails to meet the legal standard necessary to overturn TSA's award. H&K Comments at 2. H&K argues that the TSA properly determined its pistol to be the best value for the government based on the finding that the technical advantages outweighed the price differential. H&K asserts that the [Deleted] assigned to its proposal, *i.e.*, for (1) the extended slide release; (2) the ambidextrous magazine release; (3) the H&K pistol's performance in an INS independent evaluation; (4) the internal locking mechanism; and (5) the LCI, were rational, and neither arbitrary, capricious, nor an abuse of discretion. H&K Comments 9-15. Moreover, H&K argues, the TSA did not make significant or prejudicial errors in its use of the INS evaluation or its ratings relative to the Glock pistols' required trigger manipulation during disassembly and LCI. H&K Comments at 15-19.

TSA Supplemental Statement of Position

39. TSA filed a Supplemental Statement of Position on November 21, 2003, in which it addressed with more specificity the arguments raised in Glock's Comments. In the Supplemental Statement, TSA cites to various documents in the record to show that the SSO selected H&K as the best value because of the quality of its technical advantages, rather than the sheer number of key strengths and strengths. TSA further asserts that Glock's analysis distorts the language of the SSO's declaration and is not supported by the record. TSA Supplemental Statement at 1-5. TSA also explains why

Amendment Seven did not convert the procurement to one based on low price, given the rating of non-price factors as “acceptable or unacceptable” despite the assessment of key strengths, strengths, key weaknesses and weaknesses at the sub factor level. Notwithstanding its contention that any challenge to the Amendment Seven’s language is untimely, the TSA argues that:

Amendment Seven (7) only simplified the roll up by characterizing adjectival descriptions applied at the sub factor level in two categories at the non-price factor level. “Outstanding” was combined with “Acceptable” with Acceptable being defined as “the offeror’s proposed pistol meet the Government’s minimum specifications and may include one or more features that are above the Government’s minimum specifications that may add value to the pistol” [Deleted] “Marginal” was dropped as an adjectival description, but “Unacceptable” was retained for proposals that contained serious flaws that caused the proposed pistols not to meet the Government’s minimum specifications. [Deleted] Evaluators applied key strengths, strengths, key weaknesses, and weaknesses at the sub factor level on their worksheets to rank required and optional features based on added value to TSA or as a means to determine the degree to which flaws in each proposed pistol made it unacceptable. [Deleted]

TSA Supplemental Statement at 6-7.

40. TSA also argued that the lower price of the Glock pistol was properly considered insignificant, given the considerable technical advantages of the H&K pistol. TSA Supplemental Statement at 8. Additionally, with respect to the evaluation of ergonomics and adaptability, the TSA explains that the Glock pistol merely met TSA’s minimum requirements by accommodating a wide array of shooter hand sizes, while another offeror, whose pistol received a strength in this area, proposed an additional feature that actually varied the grip size. TSA contends that Glock’s argument simply reflects disagreement with the TSA’s technical evaluation. TSA Supplemental Statement at 8 – 9.

41. TSA’s Supplemental Statement further asserts that it was not arbitrary to award [Deleted] to all offers whose [Deleted] exceeded the TSA’s minimum requirements. The

TSA explained that:

The SET decided that the industry standard for [Deleted] was [Deleted], and that any offeror proposing a [Deleted] would receive [Deleted]. Accordingly, both Glock pistols received a [Deleted] for their [Deleted]. The H&K pistol was also given a [Deleted] for proposing a [Deleted]. The SET considered that [Deleted] were not particularly unique features or benefits, nor did the SET believe they offered an especially good value to TSA. [Deleted] This is evidenced by the fact that several offerors proposed [Deleted]. [See, for example, [Deleted]] Accordingly, the SET did not assign any offerors a [Deleted] for this sub factor. Furthermore, the SET recognized that durability and reliability, warranty and risk to the Government are linked. Even if an [Deleted] is offered, a [Deleted] and as such, means that there is a higher mean time between failure which causes a weapon to be out of service more often than a more durable and reliable weapon would be. As logic would indicate, this is increased risk to the Government. Generally, one might expect companies that make less expensive but less reliable and durable weapons to offer [Deleted].

TSA Supplemental Statement at 11.

42. TSA also argued in its Supplemental Statement that its use of the INS testing results was not arbitrary and errors regarding the use of that test were not prejudicial to Glock. TSA notes that the H&K pistol received a [Deleted] on the reliability test, citing GL-01452, and argues that the fact that the Glock 22 pistol failed to meet the INS solicitation requirements in no way [Deleted] the H&K pistol. TSA Supplemental Statement at 11-12. The TSA argues:

Logic alone indicates and supports the technical judgment that [Deleted]. The INS found the [Deleted] H&K not to be significant as it [Deleted]. Compared to the Glock 23, which [Deleted] the H&K received a combined score for reliability and durability [Deleted], with the Glock 23 receiving [Deleted]. [GL-01452 through GL-01453]

TSA Supplemental Statement at 14.

43. As for Glock's criticism that the INS tested pistols using higher-velocity ammunition than that which was to be used by the TSA, the TSA argues that the INS test

results were relevant because the higher velocity ammunition was within industry standards, and Glock had certified that its pistols conformed to these standards. TSA Supplemental Statement at 12.

Glock Comments on TSA's Supplemental Statement

44. Glock filed Comments on TSA's Supplemental Statement on November 26, 2003. Therein, Glock focuses on its arguments that: (1) The SSO failed to make a legally sufficient price/technical tradeoff that discussed the significance of the differences between proposals; and (2) the TSA arbitrarily assigned weaknesses and strengths. Glock's November 26, 2003 Comments at 4 and 9.

45. With respect to the first argument, Glock points to alleged inconsistencies in the SSO's post-protest explanations of his award decision and asserts that he "did not perform a legally sufficient tradeoff analysis himself." Glock's November 26, 2003 Comments at 4-5. Glock further contends that the technical advantages attributed to the H&K pistol by the SSO are arbitrary, and his finding of "best value" lacks a rational basis given "the nature of the threat" which is articulated as "trying to bring down a passenger laden airplane hitting into a building." Glock also argues that the TSA failed to consider the fact that Glock's [Deleted], resulting in an actual price difference of [Deleted]. Glock's November 26, 2003 Comments at 7- 8.

46. As for the second argument, Glock challenges the assignment of strengths and weaknesses as arbitrary and highlights the following examples:

[I]t is simply absurd and irrational for TSA to claim that a [Deleted] does not offer greater value than a [Deleted]. *See* AR, at GL-01519. TSA claims that it could not award a [Deleted] to any [Deleted] because drawing a line between a [Deleted] that was a [Deleted] and a [Deleted] that was a [Deleted] would be per se arbitrary.... That is nothing more than an abdication of responsibility. The evaluation plan included a definition of "key strength" ... and it did not say that the evaluators could ignore that definition if it was hard work. Moreover, this is not a case where one offeror offered a [Deleted] and the other offered [Deleted]. A [Deleted] obviously meets the definition of a "key strength" for being a "superior approach"....

TSA also argues that a manufacturer that offers a longer [Deleted] must be making an inferior product.... That argument is silly on its face. Glock, like most businesses, exists to make a profit. Companies that give away [Deleted] are cutting into their profits. It therefore stands to reason that a company must be very sure of its product to offer a [Deleted]. Glock makes a very reliable product. It is sure of that product's reliability and durability. And the testimonials from law enforcement officials in Glock's proposal confirm the Glock's reliability and durability. That is why it offered TSA a [Deleted].

Regarding reliability and durability, TSA continues to misconstrue Glock's objection to using the INS test results. Glock does not deny that it advertises its pistols as suited to the very ammunition that INS used. The Glock-23 malfunctioned in the INS testing only because the high-velocity 155-grain ammunition that was used required an adjustment to the spring and that adjustment had not been made by the INS testers....

Glock's November 26, 2003 Comments at 9–10. On November 26, 2003, H&K notified the ODRA that it agrees with the analysis and conclusions contained in TSA's Supplemental Statement and decided not to file any additional comments.

47. By letter dated December 10, 2003, the ODRA requested additional submissions regarding the operation and use of the internal locking mechanisms on the Glock and H&K pistols. The requested submissions were received by the ODRA on December 16,

[\[2\]](#)

2003.

48. Thereafter, the record in this matter was closed.

III. Discussion

Glock's Protest which was filed, *pro se*, on October 20, 2003, generally challenged: (1) the safety of the Glock and H&K products; (2) the testing of the Glock product by the former Immigration and Naturalization Service; and (3) the conclusions reached by the Technical Evaluators concerning the "loaded chamber indicator" of the Glock and H&K

[\[3\]](#)

products. See Protest at pages 3-7.

In its Protest, Glock sought, as a remedy, that its products be re-evaluated by a new panel led by a new Contracting Officer. If technical information on the pistols submitted as required Glock requests that a valid government test such as the through “SIC” FBI or DEA test data be used. Glock’s Protest further “requests that the TSA follow the Competition and Contracting Act of 1984 “CICA”, 41 U.S.C. §253, which requires full and open competitive procedures

[\[4\]](#)

Glock Protest a 9.

Glock’s Protest, including the Comments filed by its counsel to the TSA responses, essentially consists of: (1) its challenges to several of the assignments of strengths and weaknesses to Glock and H&K by the SET during the evaluation process; (2) its allegations of purported failure of this Source Selection Official (“SSO”) to conduct a proper price-technical tradeoff; and (3) its challenge to the conclusion reached by the SSO that the H&K pistol represented the best value to the Government, notwithstanding the price advantage of the Glock pistols.

It is well established under the Acquisition Management System (“AMS”) that, where the ODRA finds that an award decision had a rational basis and was neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that that award decision be overturned. *Protest of IBEX Group Inc.*, 03-ODRA-00275; *Protest of Computer Associates Inc.*, 00-ODRA-00173; *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, affirmed 230 F.3d 52 (DC Cir. 1999). Similarly, the ODRA has held in the best value context, that whenever source selections decisions are rationally based and are consistent with the AMS and the stated Solicitation evaluation and award criteria, the ODRA will not substitute its judgment for that of the Source Selection Official, who has broad discretion to define the agency’s needs. *See IBEX Group Inc.*, *supra*; *Protest of Information Systems Networks Corporation*, *supra*; *Protest of Universal Systems and Technologies, Inc.*, 01-ODRA-00179.

The Protester has the burden of proof under this standard and also must show that it was prejudiced as a result of the complained of actions. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232. As the ODRA has observed:

Where Agency actions are found to have been erroneous or lacking a rational basis, the Protest would not ordinarily be sustained, unless it has demonstrated that the actions in question have in some way prejudiced or resulted in harm to the Protester. *A&T Systems, Inc., supra*. The ODRA will not sustain a protest, unless the protester demonstrates the reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the Agency actions, it would have had a substantial chance of receiving the award.

Protest of En Route Computer Solutions, 02-ODRA-00220. The specific challenges raised by Glock are addressed below in light of these legal standards and burdens.

- **The [Deleted] Awarded To H&K for its Dual Loaded Chamber Indicators**

As noted above, whereas Glock was awarded a [Deleted] for having loaded chamber indicators (“LCIs”) that [Deleted] (the Glock 22 and Glock 23), H&K was awarded a [Deleted] for having [Deleted] for its H&K USP 40, [Deleted]. In this regard, TSA states that a [Deleted] was warranted by the significant reduction of safety and programmatic risks that [Deleted]. Glock, in challenging the assignment of a [Deleted] for this additional [Deleted] feature, does not reject the notion that [Deleted] but contends that the [Deleted]. (“This [faded color] creates the very dangerous situation, whereby the user who is looking for a color-marked extractor will be fooled into thinking that [the] gun is in an unloaded condition when in fact it is not.”) Protest at 6.

TSA does not accept [Deleted], *see* AR at 30, and Glock has not offered evidence of any sort to support its speculations regarding the [Deleted]. Essentially, Glock’s arguments constitute no more than a “mere disagreement” regarding the evaluation of the offered products. Glock has failed to demonstrate that TSA’s conclusion regarding LCIs was without a rational basis. Accordingly, its protest ground regarding LCIs must fail. *See*

Consolidated Protests of Consecutive Weather, et al., 03-ODRA-00250, *et al.* (“an offeror’s mere disagreement with the Agency’s judgment . . . is not sufficient to establish that the Agency acted irrationally.”)

- **The Failure to Award Glock a Strength For Accommodating Varying Grip Sizes**

As previously stated, Glock is claiming disparate treatment by TSA in the scoring of its pistol grips. More specifically, Glock contends that TSA arbitrarily failed to assign Glock a strength that it had assigned to another offeror for having a grip that accommodates a wide array of shooter hand sizes. TSA has advised that, whereas Glock’s grip – in accommodating various shooter hand sizes – satisfies the minimum requirement of the Solicitation regarding grips, the other offeror’s product contained an additional feature – a snap-on grip accessory that purportedly afforded the “widest possible array” of grip sizes – that warranted the assignment of a strength. TSA Supplemental Statement at 9. From the ODRA’s perspective, Glock merely disagrees with TSA’s assessment of the relative merits of its pistol grip and has not demonstrated that the assessment lacked a rational basis. Its protest regarding pistol grip evaluation cannot be sustained.

- **The Failure to Award Glock a [Deleted] For Its [Deleted]**

Even assuming, *arguendo*, that there is no question about the [Deleted] and that [Deleted] would offer more value than a [Deleted], Glock has not established that assignment of a [Deleted] for a [Deleted] warranty was mandatory under the Solicitation or the Evaluation Plan or that TSA’s decision not to go beyond assigning a [Deleted] for pistols offering more than a [Deleted] was lacking any rational basis, an abuse of discretion, or not consistent with the Solicitation. Under these circumstances, the ODRA will not substitute its judgment for that of the contracting officials. *See IBEX Group, Inc., supra*. Again, Glock’s argument indicates “mere disagreement” as to the evaluation results, and its protest ground cannot be sustained.

- **The Use of INS Test Results Generally and the Alleged**

Misapplication of INS Test Results to the Glock Pistols

It is clear that the Solicitation advised potential offerors that information obtained from outside sources might be considered as part of the technical evaluation of the pistols. Consideration of the results of testing performed by another federal agency, the INS (which now is part of the same Department as the TSA), was well within the evaluators' discretion in this case. Glock does not appear to challenge the use of another agency's data *per se*. Indeed, it argues that TSA should have used the results of an earlier test performed by the FBI, a test that was favorable to its Glock 22. As related above, its complaints about the use of the INS test results are three-fold: (1) assigning the H&K pistol a [Deleted] for coming out [Deleted] in the INS testing was unfair, because the Glock 22 was never tested, *i.e.*, they were not in a "head-to-head" competition; (2) the INS test results were not relevant, since they were based on the use of higher-velocity ammunition that would not be used by pilots in the confines of a cockpit; and (3) even if the INS testing were relevant, the INS did not test the Glock 23 properly, failing to make the spring adjustment Glock specified to accommodate the higher-velocity ammunition. In addition, Glock notes that TSA's finding that the Glock 22 had passed the durability and reliability aspect of INS testing was obviously incorrect, since the Glock 22 was never tested – and, for the same reason, challenges the SET's assignment of a [Deleted] for the purported failure of the Glock 22 to make it to the [Deleted] of INS testing.

First, as to the mistaken finding regarding the Glock 22 [Deleted] there is nothing in the record to indicate how that finding adversely affected technical scoring for the instant procurement. If anything, the error would have had a favorable impact for Glock and certainly would not have been prejudicial. *See Protest of L. Washington & Associates, Inc., supra.*

It is not inherently unfair or irrational to use test results simply because one of the competitor's offered products was not among the items tested. To the contrary, it would have been serendipitous for each and every potential competitor's product to have been the subject of another agency's previous test. Procurement officials have discretion reasonably to use the results of other agencies' tests. Here, the INS testing was the most

recent testing of .40 caliber semi-automatic pistols by a federal agency. As to the Glock 23 and its [Deleted] during INS testing, given that Glock had itself certified as part of the instant procurement that its pistols conformed to industry standards that would include use with the higher-velocity ammunition incorporated by the INS in its testing. *See* Finding of Fact (“FF”) 43. In this light, Glock’s contention regarding the “irrelevance” of the INS test results rings hollow.

As to its fall-back argument, *i.e.*, that the INS, in testing the Glock 23, failed to make a required spring adjustment necessary to accommodate the higher-velocity ammunition, that argument likewise fails. Under the circumstances, the SET was not under a duty to go behind another federal agency’s reported test results to determine whether testing was performed correctly by that agency. Imposing such a duty as part of a technical evaluation process in a procurement of urgently needed items would be unreasonable. Under the circumstances, where the H&K product performed [Deleted] than the Glock 23 under the INS test, coming out [Deleted] it cannot be said that the TSA evaluators acted irrationally when they assigned the H&S UPS 40 pistol a [Deleted] based on that performance. Accordingly, all of Glock’s arguments regarding INS testing miss the mark.

- **The Key Strength Awarded to H&K for its Internal Locking Mechanism**

It is undisputed in the record that: (1) the pistols of both manufacturers incorporated internal locking mechanisms, *see* FF 12,13; (2) the Solicitation expressly contemplated that pistols incorporating such mechanisms would receive higher ratings than pistols lacking such mechanisms, *see* FF 7, Technical Factor 10; and (3) pistols for both H&K and Glock received “[Deleted]” for having internal locking mechanisms, *see* FF 23.

There is some dispute about the relative utility of the respective locking mechanisms of the two manufacturers’ pistols. More particularly, Glock has challenged the awarding of a [Deleted] to H&K for its pistol’s internal locking mechanism, contending that the design of the H&K pistol is such that use of the locking mechanism presents a risk that required a lesser rating. FF30. Although the procedures specified for using the internal

locking mechanism of the H&K pistol may involve risks in circumstances that may or may not be applicable to the instant situation, the evaluation of such risks was within the reasonable discretion of the TSA technical evaluators, and Glock has failed to demonstrate that the evaluators' assignment of a [Deleted] to H&K for this feature lacked a rational basis or was otherwise arbitrary, capricious or an abuse of their discretion. The ODRA will not substitute its judgment for that of the evaluators under such circumstances.

- **The SSO's Alleged Failure to Conduct a Proper Cost/Technical Tradeoff Analysis**

The instant Solicitation called for the procurement to be conducted "utilizing Best Value Selection (BVS)" and defined "Best Value" as "the procurement process that results in the most advantageous acquisition decision for the Government and is performed through an integrated assessment and trade-off analysis among price and non-price

[\[5\]](#)

factors." AR, Tab 11, Solicitation Section M, paragraph M.1, page GL-00172.

In terms of the trade-off analysis and source selection, the Solicitation did not say it was to be done solely and independently by the Source Selection Official ("SSO"). Rather, it stated that "the *Government* will award a contract" and advised that "[w]hile the Government evaluation team and the Selection Official will strive for maximum objectivity, the selection process, by its nature is subjective and, therefore, professional judgment is implicit throughout the entire process." *Id.* (emphasis added). Thus, the Solicitation here indicated that the SET and the SSO were to act in concert for purposes of the overall evaluation and source selection.

Here, in terms of the tradeoff analysis, Glock does not assert that the SET failed to weigh technical factors against pricing of the various pistols. Rather, Glock seems to challenge as "improper" that the SSO failed to perform his own separate tradeoff analysis, and more specifically to record the tradeoff analysis as part of his source selection decision document (AR, Tab 56). In particular, Glock complains of the SSO's purported failure to discuss "the significance of the differences between Glock's and H&K's proposals."

See Glock Comments, pages 8-9.

Notwithstanding Glock's allegations regarding the purported lack of a tradeoff analysis [6] within the source selection decision document, it is clear first, that the SSO endorsed and adopted the views of the SET and second, that the SET, in its SET Final Evaluation Report, did a very detailed tradeoff analysis, taking into consideration all technical and price factors as the basis for its recommendation to the SSO that the H&K pistol be selected for award. As the Product Team correctly observes, expecting "the SSO to recopy the point-by-point trade off analysis in the evaluation record into the SSO decision" would clearly be unreasonable and "excessive," elevating "form over substance." *See* TSA Supplemental Statement of Position at page 3.

In terms of the significance of the technical differences, as explained above, Glock has not demonstrated that it was prejudiced by any errors in the SET's evaluation. Glock has failed to sustain its burden of establishing that the TSA's award decision lacked a rational basis, was arbitrary and capricious, or reflected an abuse of discretion. Thus, the challenge regarding the purported lack of a price/technical tradeoff and to the determination of "best value" in this case is without merit.

IV. Recommendation

For the foregoing reasons, the ODRA recommends that the Protest be denied in its entirety.

_____/s/_____
Anthony N. Palladino, Director
FAA Office of Dispute Resolution for Acquisition

[1]

Under a delegation of authority from the TSA, the FAA ODRA provides dispute resolution services and administrative adjudication in specified TSA bid protests and contract disputes.

[2]

The TSA submission included operating procedure information that has been designated as “Security Sensitive Information” or “SSI” pursuant to 49 U.S.C. §40119(b) and TSA Regulations at 49 C.F.R. Part 1520. The TSA response was supplied to counsel for Glock and H&K in redacted form. To the extent these Findings and Recommendations, in connection with the internal locking mechanism issue, reference information included in the TSA redacted submission, such information will be subject to the ODRA’s Protective Order for this Protest. Any public version of these Findings and Recommendations will be redacted further, so as to remove any proprietary, competition-sensitive, or source selection information.

[3]

In Glock’s reply to TSA’s Opposition to the stay request, counsel for GLOCK argues further that the SET deviated from the stated award criteria.

[4]

In filing its Protest, Glock sought to suspend all contracting activities pending the outcome of the Protest. Glock’s request for a stay was denied in a Decision of the ODRA dated October 28, 2003.

[5]

To the extent that Glock’s Protest can be read as challenging the award decision as inconsistent with a conversion to a “technically acceptable, low price” basis for award, the ODRA concludes the Solicitation Amendment 7 did not convert what was, and remains, a “best value” procurement. Thus, Glock would not be entitled to an award, regardless of technical differences, solely on the basis of its lower price.

[6]

The ODRA has found otherwise. *See* FF 14, 15 and 25.